IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 50

CITY OF PITTSBURGH, PENNSYLVANIA,
Petitioner,

v.

TENNESSEE GAS TRANSMISSION COMPANY, THE MANUFACTURERS LIGHT & HEAT CO., THE OHIO FUEL GAS COMPANY, and UNITED FUEL GAS COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE CITY OF PITTSBURGH, PENNSYLVANIA

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Citations

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Opinions Below

The orders of the Federal Power Commission (R. 524-540, 585-591) are reported at 24 F.P.C. 204 and 525. The opinions of the United States Court of Appeals for the Fifth Circuit (R. 635-646) are reported at 293 F. 2d 761.

Jurisdiction

The judgment of the Court of Appeals setting aside the Federal Power Commission's order was entered

on August 2, 1961. A petition for rehearing, timely filed by the Commission, was denied on October 5, 1961. The petition for writ of certiorari was filed December 11, 1961, and granted on January 22, 1962 (R. 660), 368 U.S. 974. The jurisdiction of this Court rests upon 28 USC 1254, and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

Question Presented

Where the Federal Power Commission, after full hearing, finds that a pipeline company has filed increased rates which are unlawful in part because they are based upon a 7% rate of return when the lawful rate is 6⅛% may the Commission order an immediate rate reduction of ⅞% or must consumers continue to pay at the 7% rate for approximately another two years until other issues involved in the increased rate filing are all finally resolved by the Commission?

Statute Involved

The pertinent provisions of the National Gas Act, 52 Stat. 821-823, as amended, 15 U.S.C. 717-717w, are set forth in Appendix A of the Brief for the Federal Power Commission in Companion case No. 48 (at pp. 47-51 thereof).

Statement

Pittsburgh's Interest In the Controversy

The City of Pittsburgh, Pennsylvania (Pittsburgh) has approximately 600,000 residents, most of whom are ultimate consumers of natural gas. Tennessee Gas Transmission Company (Tennessee), a natural gas interstate pipeline company, sells large quantities of natural gas to the Pittsburgh area distributor com-

panies, viz., The Manufacturers Light and Heat Company (one of the respondent Columbia Companies), Peoples Natural Gas Company, and Equitable Gas Company, who resell gas to Pittsburgh and its residents as ultimate consumers of natural gas.

Pittsburgh was a party in the rate proceedings before the Commission and before the Court of Appeals as a consumer and as a representative of its resident consumers. The increased rates charged by Tennessee to the distributors have been passed on to and are being paid by these consumers. The Commission's interim order of August 9, 1960, which is involved here, benefits consumers in Pittsburgh by creating lower rates and providing refunds of the excess unlawful charges to these consumers. In total dollars, Tennessee's annual increase in this rate proceeding was reduced from approximately $75 million to $64 million as a result of the Commission's determination of a 6⅛% rate of return and the interim rate reduction which followed.

The Proceedings Before The Commission

This controversy arises out of an increased rate filed by Tennessee on October 5, 1959[1] pursuant to Section 4(d) of the Natural Gas Act. This rate increase filing represents an annual increase of $26,590,138 in Tennessee's revenues based on sales for the year ended July 31, 1959. This is the third in a series of pending, contested and undisposed of annual increases in rates filed by Tennessee. In 1957, Tennessee filed an approximate $24 million annual rate increase (Docket No. 11980), and in 1958 an approximate $20 million annual

[1] Commission Docket No. G-19983.

rate increase (Docket No. G-17166). These increases became effective, and have been collected as filed subject to refund since July 14, 1957 and May 15, 1959, respectively.[2] Together, these three increases represent a pyramiding of approximately $75 million annually in increased rates.[2] This increased rate was predicted on a claimed cost of service which included a 7% rate of return on net investment (R. 490-501).[3]

On November 4, 1959, the Commission issued an order providing for a hearing to determine the lawfulness of the new rates herein involved and suspended their operation for the statutory maximum period of five months (R. 502-505). The hearing commenced February 2, 1960 (R. 524). The five month suspension period ended on April 5, 1960. During the course of the hearing the rates became effective subject to Tennessee's obligation to refund any amount found by the Commission to be unjust and unreasonable (R. 505-509).

At the hearing, Tennessee presented all of its direct evidence, but its witnesses were cross-examined only on the issue of rate of return. The staff of the Federal Power Commission and one intervenor, West Virginia Public Service Commission, presented evidence on rate of return only, and their witnesses were cross-examined. Tennessee presented rebuttal testimony on

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[2] See Footnote 1, Page 3 of the Federal Power Commission's brief in No. 48 for an explanation of how this $75 million figure is derived.

[3] The rate of return last approved by the Commission for Tennessee before then had been 6% in 1957, 18 F.P.C. 428. In Docket Nos. G-11980 and G-17166, the rates of return used by Tennessee were less than 7% but more than the 6⅛% which the Commission subsequently found to be reasonable in Docket No. G-19983.

rate of return and cross-examination of this testimony was completed May 25, 1960 (R. 524-525).

When the taking of evidence on rate of return had been concluded, the Commission staff counsel moved that the proceeding be divided into two parts:

> (1) Determination of the rate of return by the Commission directly, with omission of the Hearing Examiner's intermediate decision. He further proposed that if a proper rate of return was less than 7%, the Commission should enter an interim order reducing Tennessee's rates to the extent of the reduced amount and directing corresponding refunds for the past.
>
> (2) Determination of the other elements entering into Tennessee's cost of service following the usual procedure (including the Presiding Examiner's intermediate decision) (R. 525).

While omission of the Examiner's intermediate decision on rate of return was unopposed (R. 513), Tennessee opposed the interim order procedure.[4] Tennessee relied upon the fact that the proper method of allocating its cost of service among its six zones was in dispute, and that in the pending first rate increase for an earlier period of time, Docket No. G-11980, the zone allocation issue had been tried and was awaiting decision by the Hearing Examiner[5] (R. 591-606).

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[4] Several other intervenors, including the Columbia Companies, the other respondents here, also opposed the interim order procedure (R. 607-625).

[5] The Examiner indicated that the determination of the zone allocation issue in Docket No. G-11980 would be similarly applied in the current docket.

On June 17, 1960, the Commission granted the motion to omit the Examiner's intermediate decision on the rate of return, and provided for oral argument on the merits of the rate of return and on the procedure of ordering interim rate reductions and refunds if 7% was found excessive (R. 513-516). On June 19, 1960, Tennessee, by motion, requested the Commission to waive the intermediate decision procedure on the zone allocation issue in Docket No. G-11980 and to decide that issue simultaneously with the rate of return issue in this proceeding (Docket No. G-19983) (R. 519-521). On August 5, 1960, the Commission denied Tennessee's untimely motion (R. 521-523).

On August 9, 1960, the Commission issued the order involved here, and determined that an overall rate of return of 6⅛% was fair, just and reasonable for Tennessee. The order disallowed the rates computed at 7%, directed Tennessee to file interim reduced rates (subject to possible further refund at the end of the entire case) effective April 5, 1960, when the originally filed rates went into effect, and ordered Tennessee to make refunds from that date for any sums collected in excess of the interim reduced rates (R. 526-540). The Commission held that by requiring Tennessee to substitute rates founded on a proper rate of return, but otherwise using Tennessee's own filed rates, Tennessee and its customers were put in the same position as if Tennessee had originally filed increased rates on a lawful rate of return.

On September 27, 1960, the Commission denied an application for rehearing by Tennessee and the Columbia Companies (R. 585-591). Both applications attacked the interim order procedure, and Tennessee challenged the decision awarding a 6⅛% rate of return. The Commission pointed out that the order of August

9 providing for the filing of lower rates based on the 6½% return would result in a savings to Tennessee's jurisdictional customers of approximately $11 million annually. The substitute filing, made in November 1960, has resulted in an annual revenue reduction, in relation to "test year" figures, of about $11 million.[6] Tennessee has refunded $7,416,663, plus interest, for the period from April 5, 1960, through October 31, 1960.[7]

The Proceedings Before The Fifth Circuit

The Court below unanimously affirmed the Commission's determination that 6½% was a just and reasonable rate of return for Tennessee.

In regard to the interim order procedure, however, the Court set aside the Commission order by a 2 to 1 vote, Chief Judge Tuttle dissenting and Circuit Judge Cameron concurring in the result only, to the extent that it required Tennessee to make immediate refunds, and to make lower rates effective immediately. The majority opinion held (1) that the lack of a Commission decision on cost allocation by zones meant there was no basis for determining which of the filed rates in specific zones were lawful; (2) that while the allocation of costs in all the schedules was made by Tennessee and the burden rests on it to justify each rate in-

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[6] Stays of the reduction and refund were denied by the Fifth Circuit, Judge Wisdom dissenting, *Tennessee Gas Transmission Co. v Federal Power Commission*, 283 F.2d 729 (C.A. 5).

[7] On the basis of other issues pending in Docket No. G-19983, the Examiner recently issued a decision disallowing about $26,000,000 of the cost of service claimed by Tennessee in addition to the $11 million disallowed here. *Tennessee Gas Transmission Co.*, F.P.C. Docket No. G-19983, decision issued May 28, 1962

crease, Tennessee should not be held at its peril to foretell the decision of the Commission on the correctness of the increased rates; (3) that, until the Commission fixes the rates, the Company is protected by being allowed to collect at the filed rate and the consumer is protected by the Company's obligation to refund any excess charges with interest; and (4) regardless of the Commission's authority to issue the order, the cost allocation among zones is such an essential element in determining whether filed rates are excessive that it was an abuse of discretion to issue an interim order before deciding the allocation issue (R. 643).

Chief Judge Tuttle, dissenting, declared that he would have affirmed the Commission's order giving immediate effect to the conclusion that the rates based on the excessive rate of return were unreasonable. In his view, under the Natural Gas Act, Tennessee has the burden of establishing the validity of each element in its rate increase filing, including the cost allocations which it makes; and Tennessee cannot complain if it is placed, by the Commission's order, in the position it would have occupied initially had it based its rates on a proper rate of return (R. 646).

On October 5, 1961, the same panel of the Court, Chief Judge Tuttle again dissenting, denied the Commission's petition for rehearing *en banc*.

Summary of Argument

This case involves an interim rate procedure adopted by the Federal Power Commsision to remedy an evil flowing from the practice whereby natural gas pipeline companies file and collect from consumers grossly excessive rates. This interim rate procedure carries out the often declared purpose of the Natural Gas Act to pro-

tect consumers against unlawful exploitation by pipeline companies. The decision below erroneously rejects this purpose. It bases its reversal of the Commission upon a newly found purpose of protecting pipeline companies against possible or speculative pipeline company errors. The decision below has as its fundamental foundation, the erroneous assumption that the Natural Gas Act requires consumers to put up large enough amounts of money, even when unlawfully extracted, to guarantee or insure pipeline companies against their own possible errors in rate design. Such a decision is clearly wrong, and it must be reversed when the provisions of the Natural Gas Act are applied to the facts in this case.

The decision of the Court below, by setting aside this interim rate of return order, has impaired the continued ability of the Commission to use this important procedural device for curbing, at least to some extent, unjustified rate increases and collections of excess rates by interstate natural gas companies from customer purchasers and consumers of natural gas. The decision is in conflict with decisions of the Third and Eighth Circuits, and is inconsistent with the views of this Court in *Federal Power Commission* v. *Natural Gas Pipeline Company*, 315 U. S. 575, 583-585.

1. This Court has declared that the primary purpose of the Natural Gas Act is "to protect the consumer interests against exploitation at the hands of private natural gas companies." *Federal Power Commission* v. *Hope Natural Gas Company* 320 U. S. 591, 612. In keeping with this primary purpose, the interim order procedure provides the Commission with an effective means of providing consumers with a direct, and an immediate, remedy as a deterrent to the constant prac-

tice of interstate pipeline companies of grossly overstating their rate claims so as to collect for their use unwarranted amounts from consumers. At the same time, the interim procedure fully protects the company's right to a complete hearing and determination of all other controverted and complex issues. The interim order procedure must be upheld or the Commission must stand helplessly by during the pendency of lengthy and complex rate increase cases and permit the unjustified collection of tremendous amounts in excess rates from customers and consumers. This helplessness will exist in cases where as here the unlawful excess is beyond question and to allow its collection is a clear unjustifiable exploitation of consumers.

II. Under the statutory scheme of the Natural Gas Act, the seller of natural gas initiates rates and rate changes which are then subject to Commission review. The seller has the burden of proof in justifying these increases. Although this burden of proof may tend to discourage the filing of excessive rate increases, it is unfortunate for the consumer that this burden of proof is put to a test months and sometimes years after the increases go into effect rather than before. The express duty of the Commission is to decide rate increase questions as speedily as possible, and the fundamental duty of the Commission under the Natural Gas Act is to protect consumers from the burden of paying excessive rates. Under the broad rule making and ordering powers of the Natural Gas Act, the Commission is required to adopt procedures to expedite the proof, justification and correction of rate increase filings. This power and duty includes the early separate treatment and decision of issues which lend themselves immediately to such handling. And it includes the duty to

immediately order reduction of rates found to be excessive.

The rate of return issue decided in this case, is an outstanding example of a separable issue which can receive early treatment. At the time the Commission determined that a 7% rate of return on investment was excessive and that not more than 6⅛%, could be justified, a difference of $11 million annually, it was obvious that the many other complex issues in the case could not be disposed of until many months later. Therefore, to allow consumers to continue to pay unlawful rates based on the excessive claims of Tennessee would be a gross violation of the Commission's statutory duties. The Commission properly used the interim reduction order to afford immediate relief to the consumers as required by the Natural Gas Act.

The Commission's rate powers are not merely limited to making ultimate determinations of just and reasonable rates. Section 16 of the Act gives the Commission power "to perform any and all acts, and to prescribe, issue, make, amend and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act." This Court has upheld an interim order where the company's proof did not support the rate increases it had sought with respect to certain items of the company's proposed cost of service, *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 515, 583-585. Furthermore, the five month suspension period provided for in the Act, demonstrates that Congress did not regard the refund provision as complete protection for the consumer. If Congress had concluded that refunds where a complete consumer protection it would have provided that all rates become immediately effective upon filing.

III. The Fifth Circuit erroneously took a narrow view of the Commission's rate powers when it concluded that the decision of the rate of return issue, by an interim reduction order, was an abuse of discretion when made effective before the allocation issue was decided. The decision of the majority of the Court below fails to give appropriate weight to both the initial rate making capacity of the pipeline company, and the ultimate burden of proof. Tennessee, in keeping with the concept of the Act, put together the various components constituting a cost of service upon which it based its increased rates, put the rates into effect, and then presented its justification for its actions in the hearing before the Commission. When it struck down the unlawful rate of return, the Commission allowed each other element of Tennessee's cost of service as presented by Tennessee including the zone allocations devised by Tennessee, to remain in effect. Under these circumstances the pipeline company has no valid grounds for complaint.

A. The fact that a zone allocation issue is still pending does not in any manner restrict the Commission's authority to order an immediate rate reduction after it has determined that the pipeline company failed to justify its proposed rate of return and accordingly adjusted it downward to reflect its justness and reasonableness. Tennessee argues that they may be unable to recoup for the refund period all of the revenues necessary to yield a 6⅛% rate of return. However, this contention does not justify delaying the filing of revised rates which will provide that return. The mere possibility that Tennessee might not be able to obtain all the revenues to which it is entitled does not result from the interim rate reduction order of the Commis-

sion. This possibility could also occur without an interim rate reduction if it were determined at the conclusion of the entire case that Tennessee was entitled to more than the filed rates in some zones but required to make full refunds in other zones. Also, Tennessee cannot complain that it has a greater risk now than if it had originally filed rates based on a proper and just rate of return. In any event, the consumer is not obligated to insure a natural gas company against the effects of discriminatory rates filed by the Company or against all losses. The risks of the natural gas pipeline business are for the pipeline stockholder, not the consumer. It is enough that the pipeline company is given a monopoly market—an insured guaranteed return is not also envisioned under the Natural Gas Act.

B. The Fifth Circuit made a factual error in concluding that the allocation issue was "ripe for decision," when the interim order was adopted by the Commission. In contrast to other types of issues, rate of return requires no extensive field investigation by the Commission staff, and it presents a repetitive broad judgment question on the cost or value of capital with which the Commission is quite familiar without being materially aided sometimes by a hearing examiner's decision. However, the allocation issue discussed by the Court below, as well as other issues, present problems of novelty requiring extensive staff field investigation which not only takes longer to develop, but are of a nature that the Commission's consideration of them is enhanced by a hearing examiner's decision. The Commission's interim rate reduction order was therefore a proper exercise of its discretion. When the Commission issued the interim rate reduction order it was not in a position to decide the zone allocation

issue. This is shown by the fact that the ultimate disposition of this issue required an additional eighteen months after the Commission adopted the interim order. Therefore, the Court below erred in concluding that the zone allocation issue was "ripe for decision" when the interim order was adopted.

IV. The Court below erroneously assumed that the consumers, who continue to pay the excessive rate of return, are amptly protected by the obligation of the pipeline company to refund the excess charges with interest. Unfortunately, for the ordinary householder, in contrast to the initial payment of a lower rate and holding the line against cost-of-living increases, the overpayment and refund process is a poor substitute for an immediate rate reduction. The protection to consumers given by the refund provision of the Natural Gas Act is far from adequate. Resident consumers are ambulatory, and in the years between the excess collection and the usual refund, the consumer population for given areas invariably shifts. The administering of a refund at the consumer level is therefore not only something in the nature of an approximation, but also involves administrative detail and expense which comes out of and reduces the refund. The consumer pays all these expenses and never gets all his money back. The larger the fund the greater the expense loaded onto the consumer. The pipeline company pays nothing. It is extremely unfair to require consumers to pay out money unlawfully on rate of return on the pretext that the pipeline company may have erred in the other components of the increased rate it seeks—this unlawfully collected money to be used to insure or guarantee the pipeline company against loss due to its errors.

This speculation by the Court of Appeals is contrary to both reason and experience and also contrary to the Natural Gas Act. It is not proper foundation for continued extraction of an unlawful rate of return from consumers. The Court's attempt to shift the risks of the pipeline business from pipeline shareholders to consumers finds no basis in the Natural Gas Act.

ARGUMENT

I. The Importance of The Interim Order Procedure In The Protection of The Consumer

This Court has declared that the primary objective of the Congress in enacting the Natural Gas Act[8] is the protection of the ultimate consumer.[9] The interest of the average consumer is in the maintenance of adequate service at a just and reasonable retail rate. It is apparent that the rate at which the consumer purchases natural gas from his local distributing company is directly related to the price at which the latter purchases from the pipeline company. In fact, the most important item in the composition of the retail rate is the wholesale rate to the distributing company, over which the Commission has jurisdiction. Section 4(a) of the Natural Gas Act requires rates and charges of natural gas to be just and reasonable, and any rate or charge that is not just and reasonable is declared unlawful. Although the interests of the consumer are

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[8] 52 Stat. 821 (1938), 15 U.S.C. § 717 et seq.

[9] *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591. See also H. Rept. 709, 75th Cong., 1st Sess., pp 1-3 (1937); H. Rept. 2651, 74th Cong., 2nd Sess. (1936); S. Rept. 1162, 75th Cong., 1st Sess. (1937); 81 Cong. Rec. 6721-6728.

indirectly served, he is not fully protected under the Natural Gas Act. This is true because pursuant to Section 4(e) of the Act, the procedure is for a pipeline company to file new rates, charges, classifications or service charges with the Commission. In the first instance, the companies are in a position to put rate increases into effect without any dollar limitation or other measurable criteria.[10] The Commission may then order a hearing to determine the lawfulness of the new rate and suspend said rate for a period of five months. At the end of the five-month period, the new rates become effective subject to refund. Hence, the consumer commences paying the new rate at the end of the suspension period and continues to pay this rate unless and until the Commission determines that the pipeline company's new rate filing is lawful or unlawful. If the rate is unlawful refunds from overcharges under the new rate filing are ordered. As a practical matter, from the time the new rate is filed to the time the Commission ultimately disposes of the issues after a full hearing, takes a considerable length of time, often a period of years, during which time the company is collecting the full amount of the new and unapproved rate from the customer and consumer. A good illustration of this fact is the proceeding before the Commission out of which this controversy arose. In Docket No. G-19983, Tennessee tendered increased rates for filing on October 5, 1959 which became effective on April 5, 1960. Since April 5, 1960, Tennessee, under its new and still unapproved rate filing, has been collecting from the customers and consumers an amount

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[10] *United Gas Pipe Line Company* v. *Memphis Light, Gas and Water Division*, 385 U.S. 103; *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U.S. 332.

of $64 million annually.[11] A further practical aspect which arises from the procedure of filing for new rates is the pyramiding of rate increase filings by the same company for succeeding years while the initial rate increase filing is still pending at the Commission. Thus, the sums collected from consumers subject to refund could conceivably be multiplied several times over.[12] This pyramiding of rate increase filings along with the overwhelming increases in new rate filing by all of the pipeline companies, in general, has caused a tremendous backlog of cases pending before the Commission which has brought about the so-called regulatory lag.

In an effort to extract itself from this backlog and expedite the disposition of pipeline supplier cases, the Commission has utilized, where appropriate, the interim order procedure. In keeping with the primary purpose of the Natural Gas Act "to protect the consumer interest against exploitation at the hands of private natural gas companies," *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591, 612, and to decide rate cases "as speedily as possible" (§ 4(e)), the interim order procedure may serve both as a direct protection for consumers and as a deterrent to the interstate pipeline companies against their practice of flagrantly overstating rate claims and the col-

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[11] This figure of $64 million reflects a downward adjustment of $11 million from $75 million as a result of the Commission's disallowance of a 7% rate of return and a determination of a 6⅛%. Moreover, see note 7, supra, where if the Commission adopts the Examiner's decision, an additional $26 million will be disallowed from Tennessee's cost of service and will constitute excessive rates being collected from the customers and consumers.

[12] See *supra*, page 3.

lection of unwarranted increases. The very existence (and validity) of the interim order procedure as a potential remedy, utilized where appropriate, is most important to discourage the filing of exaggerated claims and rates based thereon. As used, and if upheld in this case, it demonstrates that the Commission need not and will not stand by during the pendency of lengthy rate increase cases and permit the unjustified collection of huge sums in excess rates from consumers, where some of the issues upon which the increases rest are subject to early separable examination and the justification is found to be deficient.'

Moreover, the obligation of the pipeline company to ultimately refund with interest any sums found excessive is not a deterrent to filing for unreasonable increases, apparently because of the tremendous amount of capital involuntarily provided by the ratepayer at a worth exceeding the actual cost to the company. If treated as equity capital, these funds earn a much higher rate of return than their cost, for while the company makes refunds with 7% interest it recoups a large part of the interest (about half if the company is in the 52% bracket) as an income tax deduction. On the other hand, as noted hereinafter, the ultimate refund is not an adequate recompense to the ultimate ratepayer for the use of his money in contrast to the initial payment of lower rates.

Therefore, the interim order procedure is an important device in protecting the consumer who bears the burden of excessive rates. And while this device affords protection to the consumer, it does not discriminate or impose an unjust burden on the company for it places the company in the same position as it would have been had its rate filing been just and reasonable

in the first instance. The company has the burden of proof initially to justify its rate filing and having failed to meet this burden of proof it is within the discretion of the Commission as to how to afford adequate protection of the consumer in carrying out the ultimate objective of the Act. The efforts of the Commission to afford prompt relief to consumers of natural gas is of such importance that to fail to use the interim order procedure in cases like this would be a departure from the Commission's responsibility and duty in carrying out the intent of Congress and the purpose of the Natural Gas Act.

II. The Authority of The Commission To Use The Interim Order Procedure and The Judicial Support For It

The Fifth Circuit's decision makes uncertain the Commission's authority to issue an interim order and the legality of such an order when zone allocation issues are still pending. The opinion of that Court raises the question as to the circumstances under which the Commission would be justified in issuing an interim rate order.

The Commission's authority to issue interim rate orders is contained in Sections 4, 5 and 16 of the Natural Gas Act. Section 4(e) states in part as follows;

> ". . . after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. . . . Where increased rates or charges are thus made effective, the Commission may, by order . . . upon the completion of the hearing and decision [to] order such natural gas company to refund,

with interest, the portion of such increased rates or charges by its decision found not justified."

Section 5(a) states in part as follows:

". . . the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates."

Section 16 provides:

"The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions of this act."

Thus, the most cursory reading of the Act, in the light of its broad purposes, indicates conclusively that the Commission can grant relief to the consumers through the interim order device, and the act forcibly emphasizes the duty of the Commission to grant such relief when, as in the instant case, from a factual standpoint, the record is ripe for the application of the express provisions of the act.

The view of the Fifth Circuit is not consonant with the views of this Court expressed in *Federal Power Commission* v. *Natural Gas Pipeline Company*, 315 U.S. 575, 583-585 where this Court upheld an interim order (in a Section 5(a) rate investigation) reducing rates. This Court recognized as appropriate the two-step procedure of first "adjustment of the general revenue level to the demands of a fair return," and second, "adjustment of a rate schedule conforming to that level so as to eliminate discriminations and unfair-

ness from its details." In sustaining the interim order, this Court held that the companies were not hurt because the Commission had entered the order on the basis only of the companies' presentation of testimony, without cross-examination of such testimony or testimony by Commission witnesses, 315 U.S. at 584, a situation much less complete than the instant case where the entire testimony and cross-examination was submitted on both sides of the issue covered by the interim order.

The basis and justification for issuing an interim order is made clear in the following language of the Commission:

> "There are those who will be rendered unhappy by the frustration of their ambition to maintain the excessive rates presently charged by the defendant-respondent companies. But to refuse a substantial reduction thereof would require us to sit, aloof from reality, and permit unlawful rates to exist without affording those suffering thereby any relief. Inaction on our part would indicate that we had fallen into a mental trap not in keeping with our responsibilities."
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> *Illinois Commerce Commission* v. *Natural Gas Pipeline Company of America*, 2 F.P.C. 218, (1940), affirmed 315 U.S. 575 after reversal on other grounds in 120 F. 2d 625 (C.A. 7).

In *Panhandle Eastern Pipeline Company* v. *Federal Power Commission*, 236 F. 2d 606 (C.A. 3), the Court rejected the company's claim that no reduction of a rate increase could be ordered until all phases of the case had been resolved. The Court held that the company had been given the opportunity to offer all of its

evidence in support of the severable elements of its claim, and had, in the view of the Commission, failed to make a prima facie showing in support thereof. Therefore, the Commission was under no obligation to postpone its disallowance of the items providing a rate reduction of about $5 million annually.

In *State Corporation Commission of Kansas* v. *Federal Power Commission*, 206 F. 2d 690, 715-716 (C.A. 8) cert. denied 346 U.S. 922, the Court affirmed an interim reduction of approximately $7½ million in increased rates filed by Northen Natural Gas Company, comprising elements as to which the Commission was of the view that the company had not made out a case.

In both the *Panhandle* and *State Corporation Commission* cases, *supra*, there remained other issues, including allocation matters to be disposed of by the Commission, but the rationale of these holdings is that the natural gas companies cannot continue to rely, and collect rates predicated, upon elements in the cost of service which have been found by the Commission to be overstated and unjustified.

Therefore, in the circumstances surrounding the instant case, the Commission not only had the authority but also the duty to issue an interim rate reduction when Tennessee's requested 7% rate of return was disallowed and the Commission determined that a 6⅛% rate of return (which was upheld in the Court below) was proper. Had the Commission remained inactive under these circumstances, the primary purpose of the Natural Gas Act to protect the ultimate consumer would have been thwarted. At the time the Commission determined that a 7% rate of return was excessive, and that not more than 6⅛% could be justified, it was obvious that many other complex issues in this case

could not be disposed of until many months later, and that therefore the consumers would have to continue to pay rates based on excessive claims if a rate reduction must await a determination of all the issues by the Commission in this rate proceeding. The difference between the 7% rate of return disallowed by the Commission and the 6¼% which the Commission determined to be proper is approximately $11 million. The Commission, therefore, properly issued the interim reduction order to afford immediate relief to consumers by reducing Tennessee's rates to effect the savings to consumers which this reduction of a substantial sum in the company's rates would effectuate. A reduction order at the conclusion of these lengthy proceedings prescribing just and reasonable rates for Tennessee could not, through refunds, make consumers whole for the unlawful part of the rates thus ended. As has been demonstrated, the Commission has the power and the duty to afford this protection to the consumer by providing immediate relief against excessive rates. The Commission has previously issued interim orders in situations similar to the instant case; and the interim order procedure has been upheld by the courts.

III. The Fifth Circuit Erroneously Limited the Commission's Rate Powers

The Fifth Circuit took a narrow and an erroneous view of the Commission's rate powers when it concluded that the Commission abused its discretion by issuing an interim order reducing the claimed rate of return by the amount it is unlawful before deciding the allocation issue. The view of the majority of the Court fails to give appropriate consideration to the initial rate making capacity of the interstate pipeline com-

pany and the burden of proof which is on the company to justify to the Commission the justness and reasonableness of the increased rate (Section 4(e). Tennessee, in keeping with the statutory scheme of the Act, put together the various components constituting a cost of service upon which it based its increased rates, put the rates into effect, and then presented its evidence of justification in the hearing before the Commission.

The Commission did not question the other elements of Tennessee's cost of service as presented by Tennessee, including the zone allocations devised by Tennessee, and considered only the rate of return component which was ultimately determined at 6¼%. The pipeline company cannot complain if all of its presentation continues to be given effect in rates except the one element which the company could not justify and which was properly revised downward. The majority of the Court below was of the view that the existence of pending, unresolved issues affecting the determination of just and reasonable rates would cause Tennessee irreparable injury if the ultimate rates determined happened to be in excess of the rates set by the interim order. This is an erroneous view of the Commission's rate decision duties and powers.

A. *A Pending Zone Allocation Issue Does Not Deprive The Commission's Use Of The Interim Order Procedure*

The rate of return issue decided in this case is an outstanding example of a separable issue that can receive early and separate treatment in a rate case. On the other hand, the allocation issue discussed by the Court below, along with certain other issues, present problems of novelty requiring investigation which take

longer to develop, and which are of a nature that the Commission's consideration of them is enhanced by a hearing examiner's decision. The rate of return issue can be resolved with greater expedition than most of the other numerous and complex issues of a rate case. This is true because rate of return requires no extensive field investigation by the Commission staff, and it presents a repetitive broad judgment question with which the Commission is quite familiar without being materially aided by a hearing examiner's decision. The obstacle to separate determination of the rate of return issue as expressed in the opinion of two of the three Judges below is that a later determination of the allocation issue might affect the earnings in each of the six zones used by Tennessee. And that if the Commission approved an allocation formula different from that used by Tennessee it was unreasonable to compel Tennessee to make a *pro tanto* correction of its rates before the allocation issue was decided. This speculation is without basis in reason or law when related up to the Commission's rate decision duties and powers under the Natural Gas Act.

The majority below, overlooked the fact that in deciding the reasonableness of one severable item of the cost of service, i. e., the proper rate of return, the regulatory agency does not guarantee the company that such a return will be earned, overall or by zones. On the contrary, the Commission merely decides that a rate of return is proper on the basis of a "test year," and that rates which will produce that return in the future are permissible, collectible and lawful rates. The end result in experience may be more or less than the estimates based on the "test year."

The fact that a zone allocation issue is still pending

does not in any manner restrict the Commission's authority to order an immediate rate reduction after it has determined that a pipeline company failed to justify its proposed rate of return and accordingly adjusted it downward to reflect its justness and reasonableness. The mere possibility that Tennessee might not be able to obtain all the revenues to which it would have been entitled had it made a proper filing, does not result from an interim rate-reduction ordered by the Commission. Such a possibility could also occur without an interim rate reduction if it were determined at the conclusion of the entire case that Tennessee was entitled to more than the filed rates in some zones but required to make full refunds in other zones. Moreover, Tennessee should not complain that it has a greater risk now than if it had originally filed rates based on a proper and just return. In any event, the consumer should not be obligated to insure a natural gas company against the effects of discriminatory rates which the company itself prepares and files.

In the *State Corporation Commission* and the *Panhandle cases*, supra, pp. 21-22), interim orders were issued by the Commission while certain issues were still pending which, upon final determination, could have resulted in rates higher than the interim rates. In both of these cases, the same risks were involved to the companies filing new rates as Tennessee contends should preclude an interim order in the instant case. And the Courts there obviously considered this risk to belong to the pipeline company's stockholders rather than to the consumers.

Furthermore, it must be noted that zone allocation issues must be resolved in almost every natural gas rate increase case. If the majority opinion below was ap-

plied to all Commission proceedings respecting interim orders, it would mean that an interim order could never be issued where it was possible to raise questions concerning zone allocations in a later phase of a rate proceeding. The consumer would have to bear the burden of a pipeline company's excessive claims throughout an entire and lengthy rate proceeding. Clearly, this rationale would thwart the intent of Congress in enacting the Natural Gas Act.

B. *The Fifth Circuit Erred In Concluding That The Allocation Issue Was Ripe For Decision*

The majority opinion of the Court below erroneously concluded that at the time the Commission issued the interim rate reduction order it could have also decided the zone allocation issue. However, the fact is that the Commission was not in a position to decide the allocation issue when it issued the interim rate reduction order on August 9, 1960. The ultimate disposition of this allocation issue required an additional eighteen months after the Commission issued the interim order.[13] Therefore, the allocation issue was not "ripe for decision" when the interim order was issued.

Under these circumstances, the Commission had good reason and exercised proper discretion when it decided the rate of return issue separately and adjusted the rates downward after its disposition without awaiting final determination of the allocation issue which required an additional year and one-half to decide. Certainly, there is no good reason to await the determination of all of the issues involved in Tennessee's cost of

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[13] Decided by the Commission on February 6, 1962, 42 P. U. R. 3rd 145.

service presentation and thus allow Tennessee to continue to collect its initially filed rates at the expense of the consumer merely because some issues cannot be decided as expeditiously as others. This is especially true when still other important issues involving Tennessee's cost of service remained unresolved at this time. Therefore, the majority opinion is erroneous in holding that the allocation issue was "ripe for decision."

IV: Refunds Are Not An Adequate Substitute for the Interim Order Procedure in Protecting the Consumer

In the broadest sense, the effect of the majority opinion of the Court below frustrates the primary objective of the Natural Gas Act which is to protect the ultimate consumer from exploitation at the hands of private pipeline companies. For the decision below appears to be based on the erroneous assumption that the consumers who continue to pay excessive rates are amply protected by the obligation of the pipeline company to refund excess charges found by the Commission to be unjust and unreasonable. The fact is that refund provisions are a poor substitute for an immediate reduction. The immediate reduction is a complete remedy. The refund is only a partial remedy.

The Natural Gas Act does not provide complete protection for the consumer who bears the burden of excessive rates, since, for the ordinary householder, the overpayment and refund process is not commensurate with an immediate rate reduction. Consumer residents are ambulatory, and in the years between the excess collection and the usual refund, the consumer population for given areas invariably shifts. Hence, the administering of a refund at the consumer level is therefore not only something in the nature of an approximation, but

also involves administrative detail and expense which comes out of and reduces the refund. Moreover, even in the event the ordinary householder does not change his residence, he cannot expect that the possibility of receiving a refund in the future will offset an immediate rise in his cost-of-living from the rate increase. The rate payer and not the pipeline pays all the costs of collecting and refunding the excess rates. He can never be made whole under that process. Only an immediate reduction of an unlawful rate can fully protect a consumer. There is nothing in the provisions of the Natural Gas Act which shift the risks of the pipeline business from the pipeline stockholders to the pockets of the consumers.

Another important factor is the 30 day notice and the rate suspension provisions of the Act. These provisions clearly demonstrate the Congress' awareness of the incomplete protection for the consumer of the refund provision of the Act. If Congress thought that the refund provision afforded the ultimate consumer adequate protection, there would have been no point in providing in the Act that the natural gas company in filing a new rate must await a thirty-day notice period before the new rate can go into effect. Also the new rate only goes into effect if the Commission does not suspend it for an additional five month period.

Conclusion

For these and the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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